

77-3673/1

OFFICE OF THE DEPUTY DIRECTOR

9 March 1977

STAT

Note For:
Associate General Counsel

Subject: Legal Representation to
Federal Employees

Dick:

The Acting Director approved the
proposed notice on DOJ representation
of government employees on 8 March.

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Assistant to the Deputy Director

Attachment:
ER 77-3673

EX-100

Justice
48-9

SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

UNCLASSIFIED

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SECRET

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OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
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ACTION	DIRECT REPLY	PREPARE REPLY
APPROVAL	DISPATCH	RECOMMENDATION
COMMENT	FILE	RETURN
CONCURRENCE	INFORMATION	SIGNATURE

Remarks: George,

The attached is addressed to the DDCI. I think the DDA could be asked to act on this without waiting for Hank's return partly because it is essentially merely a notification but also because the DDA, in his own right, issues notices, regulations, etc. On the other hand, there is nothing requiring immediate action and if either you or [redacted] want to hold for Hank, that is certainly okay with us.

FOLD HERE	RETURN TO SENDER
FROM: NAME: [redacted]	PHONE NO. [redacted]
[redacted]	DATE 3/3/77
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FORM NO. 1-67

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(40)

OGC 77-1492

8 March 1977

MEMORANDUM FOR: Deputy Director of Central Intelligence


FROM : Anthony A. Lapham
General Counsel

SUBJECT : Attorney General's Guidelines for Furnishing Legal
Representation to Federal Employees

1. The Attorney General recently issued a statement of policy in regard to furnishing representation by the Department of Justice, or private counsel in some instances, to federal employees involved as individuals in legal actions or investigations. A copy of the statement is attached. In summary, such representation will be provided in state criminal actions, all civil and congressional proceedings, but not federal criminal proceedings, where the actions concerned were performed in the scope of employment.

2. This statement has been distributed throughout the Office of General Counsel. However, in view of the general applicability of the statement and the desirability of accurately informing all employees of its contents, it may be desirable to distribute a summary statement to all employees. Accordingly, a draft Headquarters Notice on this subject is attached for your review.

3. The Justice Department regulation allows you to designate a central point within the Agency to receive and forward employee requests for such representation. If you agree, the proposed Headquarters Notice also will serve the purpose of designating this Office to perform that function and informing employees of that appointment.


Anthony A. Lapham

Attachment

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This Notice Is Current Until Rescinded

MANAGEMENT

March 1977

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DEPARTMENT OF JUSTICE POLICY REGARDING REPRESENTATION OF
GOVERNMENT EMPLOYEES

1. On 31 January 1977, the Attorney General issued a statement of policy as to the limits within which the Department of Justice will provide legal counsel for federal employees or former employees who are involved as individuals in employment-related judicial or congressional proceedings. The full text of this statement is reproduced in the Federal Register of 31 January 1977, at Volume 42, Number 20, pages 5695-96, and the regulatory provisions may be found in the Code of Federal Regulations, at Title 28, Part 50, Sections 50.15-.16. Due to the general applicability of this policy to all Agency employees, however, this Notice summarizes the Attorney General's guidelines.

2. In general, the Department of Justice will undertake to represent a current or former employee who is sued or subpoenaed as an individual in a state criminal proceeding, or in a civil or Congressional proceeding, in connection with actions which reasonably appear to have been performed within the scope of employment, providing the employee is not the target of a federal criminal investigation or indictment with respect to the same actions. Any employee who feels entitled to such representation must submit a request, accompanied by all relevant legal documents, to the Office of General Counsel, which is hereby designated as the recipient of such requests for these purposes. Communication in this regard between employees and the General Counsel shall be protected from further disclosure by the attorney-client privilege. Further, the relationship between employees and any Justice Department attorneys who represent them, even should that representation be discontinued for any reason, is confidential and governed by the attorney-client privilege.

3. The General Counsel will investigate as necessary and prepare a statement and recommendation as to whether the actions were performed in the scope of employment and whether Department of Justice representation should be provided. These materials will be forwarded to the Justice Department for a determination of whether the actions reasonably appear to be within the scope of employment, whether the employee and the actions in question are the subject of a federal criminal investigation or proceeding, and whether providing legal representation is in the interests of the United States.

4. Where, although the actions of the employee reasonably appear to be within the scope of employment, an employee and the actions involved are subject to a federal criminal investigation but no decision has been made to issue an indictment or information, the Department of Justice will decline to represent the employee, but may provide private counsel at government expense. Private counsel also will be provided in circumstances involving several employees entitled to representation by the Department of Justice whose interests are sufficiently in conflict to preclude their representation by the Department.

5. Department of Justice representation or private counsel will not be provided if the actions do not reasonably appear to have been performed in the scope of employment, a federal indictment or information has been filed against the employee as to the actions in question, a pending Justice Department investigation indicates the employee has committed a criminal offense, or such representation would not be in the interests of the United States.

Title 28—Judicial Administration
CHAPTER I—DEPARTMENT OF JUSTICE
[Order No. 683-77]

PART 50—STATEMENTS OF POLICY
Limitation for Representation of Federal Employees

AGENCY: Department of Justice.

ACTION: Statement of policy.

EFFECTIVE DATE: January 31, 1977.

SUMMARY: The attached statement of policy describes the limits within which the Department may provide for representation of Federal employees with respect to employment-related matters in which they are involved in their individual capacity. Representation in these matters is limited to state criminal proceedings, and civil and Congressional proceedings.

SUPPLEMENTARY INFORMATION: It may be helpful to set forth briefly the manner in which the representation authority set forth in the statement of policy is currently being applied. Bearing in mind that extraordinary situations may justify going to the outer limits of the guidelines, the present practice of the Department is as follows:

1. The Department will represent an employee who is sued or subpoenaed in his individual capacity, if the acts which constitute the subject of the proceeding reasonably appear to have been performed within the scope of his employment and if he is not the target of a Federal criminal investigation with respect to such actions.

2. Where, although the employee reasonably appears to have acted within the scope of his employment, a pending investigation has disclosed some evidence of his specific participation in a crime, the Department will pay for representation by a private attorney.

3. The Department will likewise pay for representation by a private attorney when several employees, otherwise entitled to representation by the Department, have sufficiently conflicting interests which in the Department's view preclude representation of each of them by the Department.

4. The Department will not represent, or pay for the representation of, any employee, if, with respect to the acts that are the subject of the representation, an indictment or information has been filed against him by the United States or a pending investigation of the Department indicates that he committed a criminal offense.

5. The Department will not provide or pay for representation where the posi-

tions taken would oppose positions maintained by the United States itself.

By virtue of the authority invested in me by 28 U.S.C. 509, Part 50 of Chapter I of Title 28 of the Code of Federal Regulations is hereby amended by addition of the following §§ 50.15 and 50.16:

§ 50.15 Representation of Federal Employees by Department of Justice Attorneys or by Private Counsel Furnished by the Department in State Criminal Proceedings and in Civil Proceedings and Congressional Proceedings in Which Federal Employees Are Sued or Subpoenaed in Their Individual Capacities.

(a) Under the procedures set forth below, a federal employee (herein defined to include former employees) may be represented by Justice Department attorneys in state criminal proceedings and in civil and Congressional proceedings in which he is sued or subpoenaed in his individual capacities, not covered by § 15.1 of this chapter.

(1) When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit a request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency, forthwith. The employee's employing federal agency shall submit to the Civil Division in a timely manner a statement, with all supporting data, as to whether the employee was acting within the scope of his employment, together with its recommendation as to whether representation should be provided. The communication between the employee and any individual acting as an attorney at his employing agency, with regard to the request for representation, shall be treated as subject to the attorney-client privilege. In emergency situations the Civil Division may initiate conditional representation after communication by telephone with the employing agency. In such cases, appropriate written data must be subsequently provided.

(2) Upon receipt of the agency's notification of request for counsel, the Civil Division will determine whether the employee's actions reasonably appear to have been performed within the scope of his employment, and whether providing representation is in the interest of the United States. If a negative determination is made, Civil Division will inform the agency and/or the employee that no representation will be provided.

(3) Where there appears to exist the possibility of a federal criminal investigation or indictment relating to the same subject matter for which representation is sought, the Civil Division will contact a designated official in the Criminal Division for a determination whether the employee is either a target of a federal criminal investigation or a defendant in a federal criminal case. An employee is the target of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibility

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RULES AND REGULATIONS

evidence of his specific participation in a crime. In appropriate instances, Civil Rights and Tax Divisions and any other prosecutive authority within the Department should be contacted for a similar determination.

(4) If the Criminal, Civil Rights or Tax Division or other prosecutive authority within the Department (hereinafter "prosecuting division") indicates that the employee is not the target of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter other than that for which representation has been requested, then representation may be provided.

(5) If the prosecuting division indicates that the employee is the target of a criminal investigation concerning the act or acts for which he seeks representation, Civil Division will inform the employee that no representation by Justice Department attorneys will be provided. If the prosecuting division indicates that the employee is a target of an investigation concerning the act or acts for which he seeks representation, but no decision to seek an indictment or issue an information has been made, a private attorney may be provided to the employee at federal expense under the procedures of § 50.16.

(6) If conflicts exist between the legal or factual positions of various employees in the same case which make it inappropriate for a single attorney to represent them all, the employees may be separated into as many groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Some situations may make it advisable that private representation be provided to all conflicting groups and that Justice Department attorneys be withheld so as not to prejudice particular defendants. In such situations, the procedures of § 50.16 will apply.

(7) Once undertaken, representation under this subsection will continue until either all appropriate proceedings, including applicable appellate procedures, have ended, or until any of the foregoing bases for declining or withdrawing from representation is found to exist, including without limitation the basis that representation is not in the interest of the United States. In any of the latter events, the representing Department attorney on the case will seek to withdraw but will ensure to the maximum extent possible that the employee is not prejudiced thereby.

(8) Justice Department attorneys who represent employees under this section undertake a full and traditional attorney-client relationship with the employees with respect to the attorney-client privilege. If representation is discontinued for any reason, any incriminating information gained by the attorney in the course of representing the employee continues to be subject to the attorney-

client privilege. All legal arguments appropriate to the employee's case will be made unless they conflict with governmental positions. Where adequate representation requires the making of a legal argument which conflicts with a governmental position, the Department attorney shall so advise the employee.

(b) Representation by Department of Justice attorneys is not available to a federal employee whenever:

(1) The representation requested is in connection with a federal criminal proceeding in which the employee is a defendant;

(2) The employee is a target of a federal criminal investigation on the same subject matter;

(3) The act or acts with regard to which the employee desires representation do not reasonably appear to have been performed within the scope of his employment with the federal government; or

(4) It is otherwise determined by the Department that it is not in the interest of the United States to represent the employee.

§ 50.16 Representation of Federal Employees by Private Counsel at Federal Expense.

(a) Representation by private counsel at federal expense may be provided to a federal employee only in the instances described in § 50.15 (a) (5) and (a) (6).

(b) Where private counsel is provided, the following procedures will apply:

(1) The Department of Justice must approve in advance any private counsel to be retained under this section. Where national security interests may be involved, the Department of Justice will consult with the employing agency.

(2) Federal payments to private counsel for an employee will cease if the Department of Justice (i) decides to seek an indictment of or to issue an information against that employee on a federal criminal charge relating to the act or acts concerning which representation was undertaken; (ii) determines that the employee's actions do not reasonably appear to have been performed within the scope of his employment; (iii) resolves the conflict described in § 50.15(a) (6) and tenders representation by Department of Justice attorneys; (iv) determines that representation is not in the interest of the United States; (v) terminates the retainer with the concurrence of the employee-client, for any reason.

(c) In any case in which the employee is not represented by a Department of Justice attorney, the Department of Justice may seek leave to intervene or appear as amicus curiae on behalf of the United States to assure adequate consideration of issues of governmental concern.

Dated: January 19, 1977.

EDWARD H. LEVI,
Attorney General.

[FR Doc. 77-2915 Filed 1-23-77; 8:45 am]

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